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Supreme Court, U.S.
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JOSEPH F. SPANIOLO, JR.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEE ROOKER,
Petitioner

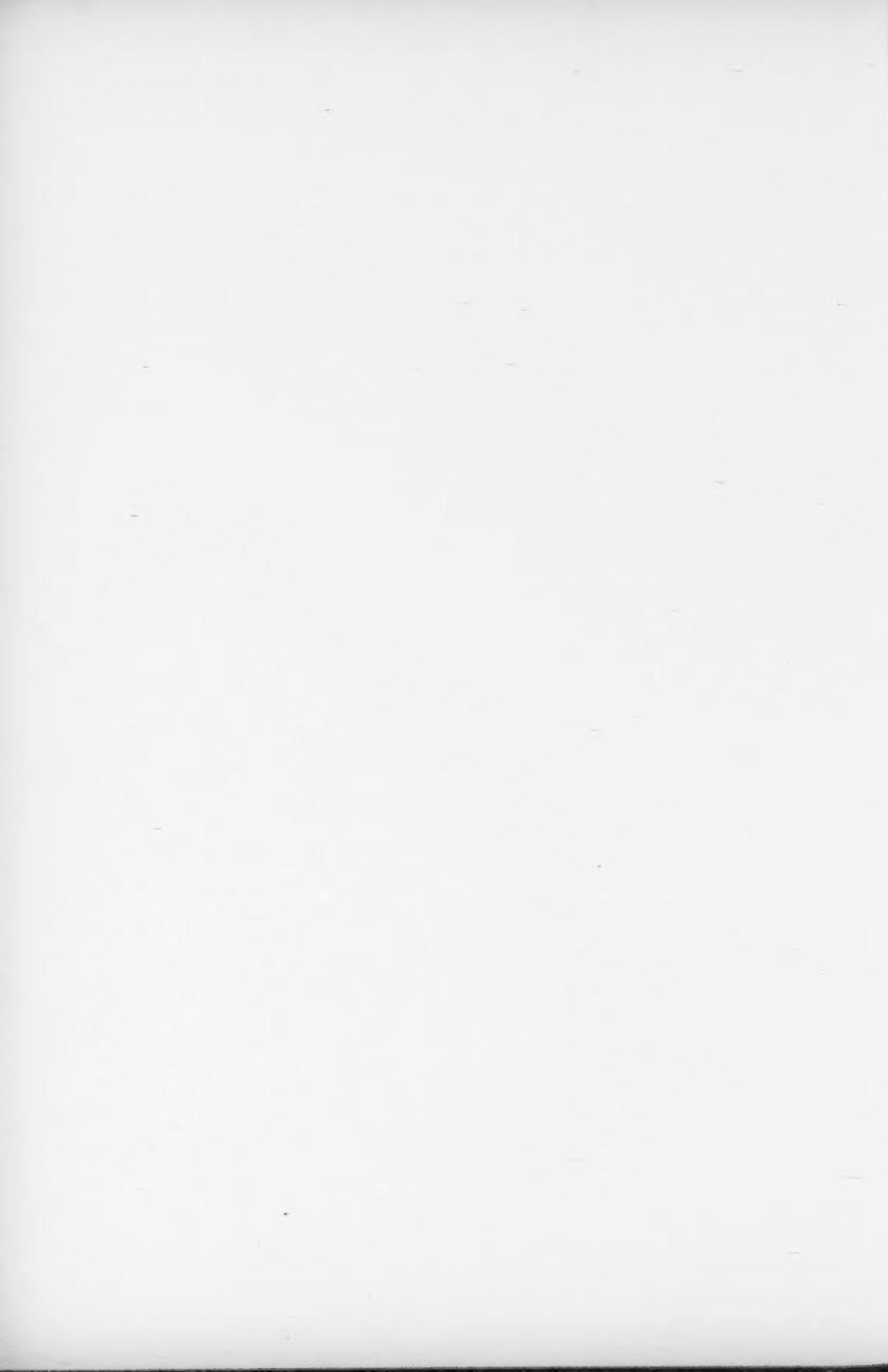
v.

ROBERT W. RIMER,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF TENNESSEE, WESTERN SECTION**

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QUESTIONS FOR REVIEW

1. Whether the state's denial of Petitioner's right to a trial by either Court or Jury denied to her due process and/or equal protection of laws?

2. Whether Tennessee's paternity blood test statute denies Petitioner due process and equal protection under the Fifth, Seventh and Fourteenth amendments of the constitution of the United States?

3. Whether Tennessee denies women due process and equal protection under the law by denying them a right to a jury trial or trial while guaranteeing men a jury trial in paternity cases?

PARTIES

1. Lee Rooker, Petitioner
2. Robert W. Rimer, Respondent -
3. Charles W. Burson, Attorney General and Reporter State
of Tennessee

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28 U.S.C. 2403 (B) 1

TENNESSEE STATUTES

T.C.A. 24-7-112 1,2,3,7,8

T.C.A. 36-2-106 1,2,7,8

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEE ROOKER,
— *Petitioner*

v.

ROBERT W. RIMER,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF TENNESSEE, WESTERN SECTION**

OPINIONS BELOW

The Juvenile Court of Shelby County, Tennessee entered an order transferring the cause to the Circuit Court of Shelby County, Tennessee for a jury trial on the issue of paternity. The Circuit Court granted a motion for summary judgment.

The Tennessee Court of Appeals issued an opinion which sustained the ruling of the Circuit Court, but held that said court was without jurisdiction to have heard the case.

The Tennessee Supreme Court denied an application for permission to appeal.

JURISDICTION

On August 7, 1989, the Supreme Court of Tennessee denied Petitioner's application for permission to appeal from an adverse decision rendered against her by the Court of Appeals of Tennessee, Western Section.

Jurisdiction is conferred upon this Court pursuant to 28 USC Sec. 1257 (a) and Supreme Court Rule 17.1 (c) in that the questioned Tennessee Statutes are repugnant to the Constitution of the United States as shall be described with more particularly hereafter:

As this proceeding questions the validity of a Tennessee statute, 28 US C 2403 (b) may apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- A. U.S. Constitution, Amendment Five
- B. U.S. Constitution, Amendment Seven
- C. U.S. Constitution, Amendment Fourteen
- D. Tenn. Constitution, Art. 1, Sec. 6
- E. Tenn. Constitution, Art. 1, Sec. 8
- F. Tenn. Constitution, Art. 1, Sec. 17
- G. T.C.A. 24-7-112
- H. T.C.A. 36-2-106

STATEMENT OF THE CASE

Rooker gave birth to Rimer's son on April 7, 1972. She instituted these paternity proceedings against Rimer in December, 1985 in the Juvenile Court of Shelby County, Tennessee. A blood test was ordered and administered to mother, father and son. Reports of the results of these tests were received which purported to exclude the putative father.

On June 23, 1986, the Juvenile Court transferred the case to the Circuit Court of Shelby County, Tennessee for a jury trial on the issue of paternity pursuant to T.C.A. 36-2-106.

On January 20, 1988, Petitioner moved the Court for an Order requiring a DNA genetic test, which was denied.

On June 6, 1988, Petitioner advised the Tennessee Attorney General of the challenge to T.C.A. 24-7-112.

On June 9, 1988, Petitioner moved the trial court for a hearing on the issues of the constitutionality of denying the Petitioner a right to a jury trial.

On June 23, 1988, the Attorney General moved to intervene.

On July 26, 1988, the trial court dismissed Petitioner's case.

On May 4, 1989, the Tennessee Court of Appeals ruled against the Petitioner and held that T.C.A. 24-7-112 was constitutional. On August 7, 1989, the Tennessee Supreme Court denied Petitioner's application for permission to appeal.

ARGUMENT

A. Tennessee Denied Petitioner Due Process of Law.

By holding that Petitioner's case should have been dismissed upon receipt of the negative blood test and holding that the Circuit Court lacked jurisdiction to hear her case, the Petitioner was denied due process of law.

This test was authorized by the following statute which is constitutionally repugnant for its denial of even minimal due process guarantees:

T.C.A. 24-7-112. Tests to determine parentage—Admissibility in evidence—Costs.—(a) In the trial of any civil or criminal proceeding in which the question of parentage arises, the court before whom the matter may be brought, upon the motion of either party at the initial appearance, shall order that all necessary parties submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage. Failure to make a timely motion for submission to such tests and comparisons shall constitute a waiver and shall not be grounds for a continuance. The results of such tests and comparisons, including the statistical likelihood of the al-

leged parent's parentage, if available, may be admitted into evidence as provided in subsection (b) of this section:

(b) Upon receiving the results of the test and comparisons conducted pursuant to subsection (a) of this section, the Court shall proceed as follows:

(1) If the results of the tests and comparisons exclude the Defendant as the father of the child, this evidence shall be conclusive evidence of non-paternity and the Court shall dismiss the proceeding.

The statute is offensive in at least two respects. First, it denies the mother due process and her "day in Court" by mandating a peremptory dismissal of her claim if the results of "Any tests and comparisons" exclude the Defendant as the Father. The Court of Appeals held that this mandate was jurisdictional and required dismissal of the action without Rooker's right to 1.) her day in court; 2.) proper authentication of the test results; or 3.) cross-examination of any medical experts as to accuracy of the test or its results.

In apparent violation of the statute, the Juvenile Court transferred the case to the Circuit Court of Shelby County, Tennessee. It was at this stage of the proceedings that Rooker raised the constitutional issues with the required notice to the State. She had had no prior opportunity to do so. Following that Court's granting of summary judgment, she again raised the issue on appeal to the Court of Appeals and, subsequently to the Tennessee Supreme Court.

In each case, her appeals were fruitless. (See Court of Appeals decision, pp. 1-3.)

As authority for her contentions, Rooker cites to the Court the Fourteenth Amendment to the United States Constitution which provide: "No state shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. 14, Sec. 1.

This Court has held that:

[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty

through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401
U.S. 371, 377, 91 S. Ct. 780,
785, 28 L. Ed. 2d 113 (1971)

This Court has enunciated the following test to determine whether due process has been met.

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Florida, 424 U.S.
319, 335, 96 S. Ct. 893, 903,
47 L. Ed. 2d 18 (1976)

The following decisions of other states have held that due process guarantees have been met where the blood tests are properly authenticated and the effected party has an opportunity to cross-examine any experts as to the accuracy of the test administered and/or the availability of other tests. *Davis v. Washington*, 453 So. 2d 712 (Miss. 1984) (providing for proper authentication, and cross-examination of expert); *Buchland v. Commonwealth of Virginia*, 229 Va. 276, 329 SE. 2d 803 (1985) (Requiring proof of chain of custody of blood samples, proper testing procedures, proper authentication by expert); *Lyle v. Eddy*, 481 So. 2d 395 (Ala. Civ. App. 1985) (Requiring proper foundation and authentication chain of custody of samples, and non-hearsay testimony.); *Chandler v. Baker*, 700 SW 2d, 378 (Ark. App. 1985) (Requiring presence of expert, cross-examination, and non-hearsay testimony as to test procedures and results.)

In all of the foregoing cases, the parties retained the right to a trial regardless of the test results. In the case *sub judice*, the Tennessee statute mandates peremptory dismissal of Petitioner's claim.

Tennessee law does *not* authorize summary judgment in paternity cases, even where the blood test results are strongly negative. *Rooker*, supra, at pp. 5-7, *Hudson v. Capps*, 651 SW 2d 243 (Tenn. App. 1983); *Lightfoot v. Hardaway*, 751 SW 2d 844, 849 (Tenn. App. 1988).

B. Tennessee Law Denied Petitioner Equal Protection Of Laws

Petitioner was denied her right to a trial by Court or jury pursuant to the above cited statute T.C.A. 24-7-112. However, men are *guaranteed* a right to a *jury* trial in paternity cases pursuant to T.C.A. 36-2-106, as follows:

36-2-106. Conduct of trial—Failure to appear—Order—Expedited hearings—(a) The trial shall be by the court without a jury unless the defendant shall demand a jury or the judge of his own motion orders, in either of which events the case shall be transferred to the circuit or chancery court for jury trial on the issue of paternity. If the mother is married, both she and her husband may testify to non access. The court may exclude the general public from the room where proceedings are had, pursuant to this part, admitting only persons directly interested in the case, including officers of the court and witnesses. (b) If, within thirty (30) days from the date of the entry of the order transferring the case is transferred to the circuit or chancery court, the defendant fails to file an answer to the paternity petition, summary judgment may be taken against such defendant, provided notice of the proceeding is served upon the defendant or his attorney of record. If the defendant fails to appear, the security of his appearance shall be forfeited and shall be applied upon the order of paternity and support, and a default judgment may be

taken, provided notice of the proceeding is served upon the defendant of his attorney of record. (c) If the finding be against the defendant in a case transferred to the circuit or chancery court, the circuit or chancery court may thereupon take whatever proof it considers necessary without the intervention of a jury and may make an order of paternity and support as set out in 36-2-108. When the order of the circuit or a chancery court becomes final, it may be remanded to juvenile court for subsequent proceedings.

When read *in pari materia* with T.C.A. 24-7-112, it becomes clear that one's gender greatly affects available options. Under T.C.A. 36-2-106 (a), the man may demand a jury trial without respect to results of any blood test. Summary judgment may be granted only if he fails to answer.

A woman, however, has no right to demand a jury under either statute. And, moreover, should the blood tests purportedly exclude the man, she loses a right to any hearing on the merits and other matters of basic due process attendant thereto.

There is no rational basis for the State to guarantee such a fundamental constitutional right to one sex, but deny it to the other. In fact, women are denied 1.) access to courts; 2.) right of cross-examination witnesses 3.) right to trial; and 4.) right to a jury under the offending statute.

This distinction cannot pass the constitutional muster in light of this Court's holdings in *Frontier v. Richardson*, 411 US 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973); *Reed v. Reed*, 404 US 71, 92 S. Ct. 251, 30 L. Ed. 2d 225; and *Stanton v. Stanton*, 421 US 7, 95 S. Ct. 1373, 43 L. Ed. 2d, 688.

The case *sub judice* presents this Court with a gender-based classification involving a fundamental, constitutional right which cannot be rationally justified, thus, the Tennessee Court's decision should not stand.

CONCLUSION

The common ethic under our system of laws is that the same law of substantive rights and procedure applies equally to all except in the presence of compelling circumstances. Certainly, the law of paternity actions has experienced many radical changes in the last one hundred-plus years, but that cannot justify a result as has occurred herein.

It is unjustifiable in any rational sense that a right to a trial or a right to a jury turns on one's sex.

If the results of the blood test favor the woman, the man may demand a jury trial. If, however, the test results favor the man, the woman shall not have the right to be heard further.

Such a legal result cannot be sustained.

Respectfully submitted,

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Attorney for Petitioner

AFFIDAVIT OF SERVICE

The undersigned being a member of the Bar of this Court states that on November 6, 1989, three copies of the Petition for Writ of Certiorari were served upon opposing counsel as follows:

Randall J. Fishman
Attorney for Opposing Counsel
142 N. Third Street, Third Floor
Memphis, Tennessee 38103
(901) 525-6278

Charles W. Burson
Attorney General and Reporter
for the State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-3491

by United States Mail first class postage pre-paid pursuant to Rules 28.3 and 28.4 (c), respectively.

/s/ James F. Schaeffer, Jr.

James F. Schaeffer, Jr.
Attorney at Law

IN THE JUVENILE COURT OF
MEMPHIS AND SHELBY COUNTY, TENNESSEE

LEE ROOKER

v.

ROBERT W. RIMER

Docket No. 103658

ORDERED

This cause came on to be heard upon a sworn petition alleging the defendant to be the natural father of the child(ren) named in the aforesaid petition, and on petitioner's request, the Court upon its authority in this cause, transfers to the Circuit Court of Shelby County, for a jury trial on the issue of paternity.

IT IS THEREFORE ORDERED

1. That this case be and is hereby transferred to the Circuit Court of Shelby County for a jury trial on the issue of paternity.
2. That all records concerning this case be and is hereby transferred to the Clerk of Circuit Court.

This 18th day of June, 1986

Randall J. Fishman, Atty for Defendant
Sterick Building Suite 2608
Memphis, Tennessee 38103

/s/ William Ray Ingram
Special Juvenile Court Judge

mc
JC-41

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

LEE ROOKER, *Plaintiff*

vs.

ROBERT W. RIMER, *Defendant*

NO. 107299-7 R.D.
DIVISION SEVEN
BOOK 40 PAGE 139
ENTERED JULY 26, 1988

**ORDER GRANTING SUMMARY JUDGMENT,
OVERRULING MOTION TO DELAY ENTRY OF
JUDGMENT, AND DENYING MOTION OF
ATTORNEY GENERAL**

This cause came on to be heard upon the motion of the defendant (respondent) Robert Rimer for a summary judgment and of plaintiff (petitioner) Lee Rooker for a blood specimen from defendant for a DNA print identification test; upon oral argument of those motions and the Court's oral ruling thereupon; upon written motion of the plaintiff to delay entry of the judgment and to grant permission to raise the constitutionality of T.C.A. 24-7-112(b)(1); upon the motion of the Attorney General to intervene as a party; and upon the entire record in this cause from all of which it appears to the Court and the Court finds that:

This is a paternity action. Plaintiff married a man other than the defendant on January 18, 1972. The child in question was born on April 7, 1972. This petition to declare the defendant the father of the child was filed on or about December 4, 1985 in the Juvenile Court of Shelby County, Tennessee.

At the request of the plaintiff, a blood test known as the

ABO and RH test was done, excluding the defendant as the father, despite the plaintiff's affidavit that he is the father.

Plaintiff requested a second blood test, known as the ABO, RH, Kell, and HLA test. Once again, the defendant was excluded as the father by the overwhelming weight of the report dated February 21, 1986.

On June 18, 1986, the Juvenile Court transferred this case to the Circuit Court. On November 16, 1986, the defendant filed a motion to dismiss or for summary judgment, relying upon the presumption of legitimacy of a child born to a couple which has married when the wife was pregnant (*Tyler v. Tyler*, 671 S.W.2d 492, 1984) and the two blood tests. At that time, the record contained only the letters from the laboratory performing the blood test, which the Court did not consider sufficient compliance with Rule 56.05 of the Tennessee Rules of Civil Procedure, and the defendant's motion was denied.

Subsequently, on March 23, 1988, defendant obtained the testimony by deposition of Grace Neitzer, technical director of the blood bank of Baptist Hospital of Memphis, where the blood tests in question were performed. She testified that, in effect, the blood tests completely exclude the possibility of the defendant being the father of the child. That testimony was filed in support of the defendant's motion for a summary judgment, which was renewed and re-argued on June 3, 1988, at which time, for the first time, plaintiff raised the question of the constitutionality of T.C.A. 24-7-112(b)(1) and the Court advised counsel that the Court could not consider the issue if the Attorney General's office had not been notified in accordance with the rules. The Court then proceeded to deny the plaintiff's request for an additional blood test and to grant the defendant's motion for a summary judgment upon the ground that there was no genuine issue as to any material fact and that the defendant was entitled to a judgment as a matter of law. This ruling was based upon both the fact that there were no documents in the record to contradict the expert testimony of Grace Neitzer and the provisions of T.C.A. 24-7-112(b)(1). No written order was entered embodying the Court's oral ruling on that date and, on June 9, 1988, the plaintiff moved the Court

to delay entry of the judgment so as to give notice to the Attorney General and raise the constitutional issue. The Attorney General, in response, moved to intervene. Oral argument then was heard from both sides on July 21, 1988.

The Court, after giving this matter careful and serious consideration is of the opinion that the law requires that the plaintiff's motion be denied and that a final summary judgment be entered in favor of the defendant. This petition was brought by plaintiff on December 4, 1985, over 13 years after the birth of the child. She swore that the child was born out of wedlock, although it was apparently born at a time when she was married to another man. Plaintiff requested, and defendant submitted to, two separate blood tests, both of which rather conclusively established that he is not the father of the child. Now that a newer and, presumably, more accurate blood test has been developed, plaintiff wishes to delay matters and to force defendant to submit to it as well. However, at the oral argument of the motion for summary judgment in June, plaintiff's counsel did not have authority from plaintiff to agree to abide by the results of that test. No affidavit or deposition of any kind contradicting the blood tests has been filed in the record by the plaintiff. She does file her own affidavit that she had sexual relations with no other man during June, July and August of 1971, and says that the only act of sexual intercourse with the defendant was on July 2, 1971. By implication, she relies upon the presumptions about the usual periods of gestation to support her position that it was impossible for anyone else to be the father. Quite apart from the conclusive presumption of paternity among married couples (*Tyler v. Tyler*, 671 S.W.2d 492, 1984), it appears to be the law of this state that the testimony of a plaintiff that she had relations with no other person than defendant during the normal period of conception cannot stand against uncontradicted testimony of an expert witness with respect to scientific matters such as the result of the blood tests. This is true, even if the trier of fact should credit the testimony of the plaintiff over the expert. *Hudson v. Capps*, 651 S.W.2d 243 (Tenn. App. 1983). While the Court might

disagree with the logic of that case, it does not feel free to disregard it.

Having found that plaintiff would not be entitled to recover in this case even if the statute denying her a trial were declared unconstitutional, this Court will adhere to the doctrine that it should not pass on the constitutionality of a statute unless it is absolutely necessary for the determination of the case and the rights of the parties to the suit. *State v. Murray*, 480 S.W.2d 355 (Tenn. 1972).

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendant is granted a summary judgment and the action of the plaintiff against the defendant is dismissed with prejudice, at the plaintiff's costs.
2. The request of the plaintiff for additional blood tests is denied.
3. The motion of the Attorney general to intervene as a party is moot, and is, therefore, denied.

/s/ Robert A. Lanier

Judge

July 26, 1988

Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed to Mr. Edward W. Chandler, Attorney, Lincoln American Tower, 50 N. Main St., Memphis, TN 38103, Mr. Randall J. Fishman, Attorney, 142 N. Third St., Memphis, TN 38103, and Assistant Attorney General Stuart F. Patton, 450 James Robertson Parkway, Nashville, TN 37219-5015 by U.S. Mail, postage prepaid on this the 26 day of July, 1988.

/s/

Deputy Clerk

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

LEE ROOKER, *Plaintiff-Appellant*,

v.

ROBERT W. RIMER, *Defendant-Appellee*.

SHELBY LAW. NO. 18

From the Circuit Court of Shelby County, Tennessee
The Honorable Robert A. Lanier, Judge

Edward Witt Chandler of Memphis
Attorney for Plaintiff-Appellant

Randall J. Fishman of Memphis
Attorney for Defendant-Appellee

Charles W. Burson
Attorney General and Reporter

Stuart F. Patton
Assistant Attorney General

Opinion Filed: May 4, 1989

AFFIRMED

HIGHERS, J.
CRAWFORD, J. (Concurs)
FARMER, J. (Concurs)

The plaintiff, Lee Rooker, has appealed a summary judgment in favor of the defendant, Robert W. Rimer, in a paternity action in the Circuit Court of Shelby County.

Rooker alleges that she and Rimer engaged in sexual intercourse on July 2, 1971, and that she engaged in no other sexual intercourse in June, July and August of 1971. In January

of 1972, Rooker married another man and on April 7, 1972, gave birth to a son giving him the name of her husband and the designation "Jr."

Rooker divorced her husband in July of 1979, and in December of 1985, she filed a petition against Rimer to establish paternity in the Juvenile Court of Memphis and Shelby County. Under a court order, Rooker, Rimer, and the son submitted to blood tests which excluded Rimer as the father. Another more specific test was given which also excluded Rimer, and the case was then transferred at Rooker's request, pursuant to T.C.A. §36-2-106(a) (Supp. 1988), to the Circuit Court for trial. The Circuit Court disposed of the case by granting Rimer summary judgment. Rooker has appealed.

T.C.A. §24-7-112 (Supp. 1988) provides in pertinent part as follows:

24-7-112. Tests to determine parentage—Admissibility in evidence—Costs.—(a) In the trial of any civil or criminal proceeding in which the question of parentage arises, the court before whom the matter may be brought, upon the motion of either party at the initial appearance, shall order that all necessary parties submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage. Failure to make a timely motion for submission to such tests and comparisons shall constitute a waiver and shall not be grounds for a continuance. The results of such tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, may be admitted into evidence as provided in subsection (b) of this section.

(b) Upon receiving the results of the tests and comparisons conducted pursuant to subsection (a) of this section, the court shall proceed as follows:

(1) If the results of the tests and comparisons exclude the defendant as the father of the child, this evidence shall be conclusive evidence of non-paternity and the court shall dismiss the proceeding.

As stated above, Rooker requested two sets of blood tests, both of which excluded Rimer as the father. Although the Ju-

venile Court transferred the case to the Circuit Court, under the statute, the Juvenile Court was actually without authority to do so. The statute *requires* dismissal of the proceeding, and the Juvenile Court was without authority to do anything else.

Apart from any valid appeals which might be made, the blood tests completely dispose of Rooker's case against Rimer. However, the Circuit Court expressly did not rely on blood tests as required by statute, addressing instead more substantive issues. Part of the Circuit Court's motivation in doing so was the avoidance of constitutional challenges to the statute raised by Rooker. The trial court was attempting to adhere to the principle from *State v. Murray*, 480 S.W. 2d 355, 357 (Tenn. 1972), that a court shall not pass on the constitutionality of a statute unless it is absolutely necessary for the determination of the case and the present rights of the parties to the litigation.

Determination of the constitutionality of T.C.A. §24-7-112(b)(1) was necessary for determination of this case. If constitutional, the statute prevents the Circuit Court from granting a summary judgment. The court has no subject matter jurisdiction. The statute required the Juvenile Court to dismiss the case, and did not allow the transfer for jury trial.

The challenge asserted against T.C.A. §24-7-112(b)(1) is that it "divests" Rooker of her statutory and common law rights to a trial by a jury. Article I, Section 6 of the Tennessee Constitution provides that "the right to a trial by jury shall remain inviolate." This issue has been briefed and argued by both sides and by the Attorney General.

The statutory basis asserted by Rooker for a constitutionally protected right is T.C.A. §36-2-106(a). That statute requires the Juvenile Court to transfer the case to Circuit Court for jury trial when the defendant so requests, or allows the trial court to transfer for jury trial on its own initiative. The order of transfer by the Juvenile Court stated that "on petitioner's request, the Court upon its authority in this cause, transfers to the Circuit Court of Shelby County for a jury trial on the issue of paternity." Rooker's right to a trial by jury does not arise as a mandate of the statute, but it arises, if at all, by

virtue of the court's discretionary order under the statute. However, the order was issued after the blood tests excluded Rimer, and as stated above, the test results abrogated the Juvenile Court's discretion to order a jury trial. T.C.A. §24-7-112(b)(1) does not therefore divest Rooker of a right to a trial by jury. Such a right never vested. T.C.A. §24-7-112(b)(1) does make void the order, pre-empting and abrogating any rights therein which would otherwise have arisen.

Rooker asserts that even if she had no right to a trial by jury under T.C.A. §36-2-106(a), she has a constitutionally protected right to one as a matter of common law. Juries were not available under Tennessee common law in paternity cases. *Goddard v. State*, 10 Tenn. (2 Yerg.) 96 (1825); *Kirkpatrick v. State*, 19 Tenn. (1 Meigs) 124 (1838). "[T]he cases in which courts act without a trial by jury or 'peers' are innumerable and undefined, being '*by the law of the land*.'" (emphasis in original)" *Goddard*, 10 Tenn. (2 Yerg.) at 100. If a paternity case is litigated under the law of the land, and those laws provide no trial by jury, there can be no complaint. *Id.* In *Goddard*, it was pointed out that at one time, the affidavit of the mother was conclusive evidence of paternity by the man charged. *Id.* at 99. There was *no* trial, much less one by jury. The Tennessee General Assembly passed a statute in 1822 which allowed the defendant to file a countervailing affidavit, and thereafter to put on proof, but, there was no jury, the mother was not required to testify and the defendant was not allowed to cross-examine the mother if she did not choose to testify. The policy behind the law was to allow the mother to leave behind a single transgression or, if her transgressions were several, to encourage her to return to a virtuous lifestyle. It was felt that forcing her to testify before peers or in a court of record might inhibit those endeavors on her part. Though it was not reversible error to try a paternity case by jury, *State v. Coatney*, 16 Tenn. (8 Yerg.) 210 (1835), there was no right to one in either party.

Rooker therefore possessed no statutory right and no common law right to a trial by jury, and there is no constitutional breach by application of T.C.A. §24-7-112(b)(1). Dis-

missal is the proper disposition of this case upon conclusion of blood tests excluding Rimer as the father of Rooker's son.

Rooker asserts that further tests under T.C.A. §24-7-112 should have been ordered when requested in Circuit Court. Since the Circuit Court did not possess subject matter jurisdiction, it could not have properly ordered DNA testing. If the Circuit Court had possessed subject matter jurisdiction, there was still no error in its denial of the tests, even if the tests were unknown or unavailable at the time the original blood tests were ordered. Granting a subsequent order was a matter within the discretion of the trial court, and the trial judge was able to weigh the merits of granting or denying a request for DNA tests, including the newness or improvements of a particular test. Apart from the Circuit Court's lack of jurisdiction Rooker has shown no abuse of the trial court's discretion.

Rimer's motion for summary judgment before the Circuit Court contained two grounds in addition to the conclusiveness of T.C.A. §24-7-112(b)(1). He asserted a conclusive presumption given to the uncontradicted testimony of an expert witness under *Hudson v. Capps*, 651 S.W. 2d 243 (Tenn. App. 1983). Accordingly, Rimer attached the affidavit of the lab technician associated with the blood tests. Rimer also asserted that because Rooker was married to another man at the time of the child's birth, Rooker's husband is conclusively presumed to be the father under *Tyler v. Tyler*, 671 S.W. 2d 492, 494 (Tenn. App. 1984).

The lab technician's affidavit was controverted by Rooker's own personal affidavit that Rimer was her only sex partner in the summer of 1971, the time during which her child was necessarily conceived, with the conclusion that Rimer must therefore be the child's father. As noted, Rimer relied on *Hudson*, *supra* as dispositive under the circumstances. From the following excerpt from the trial court's order, it appears the Circuit Court agreed:

Quite apart from the conclusive presumption of paternity among married couples..., it appears to be the law of this state that the testimony of a plaintiff that she had relations with no other person than defendant during the

normal period of conception cannot stand against uncontradicted testimony of an expert witness with respect to scientific matters such as the result [sic] of blood tests. This is true, even if the trier [sic] of fact should credit the testimony of the plaintiff over the expert. *Hudson v. Capps*, 651 S.W. 2d 243 (Tenn. App. 1983). While the Court might disagree with the logic of that case, it does not feel free to disregard it.

As a matter of common law, contrary to the trial court's analysis, *Hudson* does not stand for the proposition that the trier of fact is bound by the testimony of an expert over that of a plaintiff in paternity cases. The rule from *Hudson* is simply that expert testimony cannot be ignored.

One of the purposes for affidavits supporting motions for summary judgment under T.R.Civ.P. 56.05, such as the affidavit under consideration here, is to accelerate litigation, remove insubstantial issues, and confine the trial to genuine issues by allowing the court to review the affidavits as indicative of the testimony which would be presented at a trial, and if the affidavits showed there is no real dispute, to dispose of the issue. Prior to adoption of this rule, if the case could not be disposed of by a demurrer on the pleadings alone or under a plea in abatement, there was a trial. See T.R.Civ.P. 56 Committee Comments. This purpose of issue identification through affidavit "previews" of testimony is not furthered if *Hudson* is applied as the Circuit Court applied it.

In *Hudson*, the plaintiff claimed she had no other sex relations which could have resulted in conception of the child, but the defendant denied that he had sexual relations with the plaintiff during that time period. The "unimpeached, uncontradicted testimony of an expert witness," based on a test which was "more than 99.99% accurate," was that the defendant was not the father. *Hudson*, 651 S.W. 2d at 247. Judge Crawford, writing for this Court, indicated that if the blood test had been ignored, and the trier of fact merely chose the most credible of the two witnesses, a finding for the plaintiff could have been affirmed. *Id.* However, in light of the uncontroverted expert testimony, under the standard of review as

stated in T.R.A.P. 13(d), the evidence in the record preponderated against a finding for the plaintiff, and the trial court was reversed. *Id.* at 247-248.

In *Hudson*, the evidence in the record as a whole, including the expert testimony, preponderated against the testimony of the plaintiff. However, it was not the expert testimony alone which motivated this Court to reverse the trial court in *Hudson*, and while there might be a case where expert testimony alone is enough to merit a holding against a plaintiff who testifies contrary to the expert testimony, *Hudson* does not stand for the proposition that such a weighting is the rule. The weight to be given the expert testimony is for the trier of fact. *Lightfoot v. Hardaway*, 751 S.W.2d 844, 849 (Tenn. App. 1988).

The second argument upon which Rimer based his motion for summary judgment, the conclusive presumption applied to the mother's husband, comes from *Tyler v. Tyler*, 671 S.W.2d 492 (Tenn. App. 1984). Under Tennessee case law, a husband who, at the time of marriage, has knowledge that his wife is pregnant by another man is responsible for support of the child when born. *Id.* at 494. He is regarded by the law as adopting the child into his family at its birth. The adoption is by law a part of the marriage contract, and the law conclusively presumes that the husband is the father of the wife's child. *Tyler*, *supra*, citing *State v. Shoemaker*, 62 Iowa 343, 17 N.W. 589 (1883); *Gustin v. Gustin*, 108 Ohio App. 171, 161 N.E.2d 68 (1958). See also *Cunningham v. Golden*, 652 S.W.2d 910, 912 fn. 3 (Tenn. App. 1983). Although there are authorities to the contrary, the rule in Tennessee is that because a husband by his marriage and assumption of position *in loco parentis* has profoundly altered the status, rights and responsibilities of others, in particular the right of the child to support from the natural father, a husband may be required to support a child conceived by another man where the husband was aware of the pregnancy prior to marriage. *Tyler*, 671 S.W.2d at 494. In *Tyler*, it was undisputed that Mr. Tyler was not the natural father of the child, that he knew it, and that he knew the identity of the real father well in advance of the marriage. *Id.* at 493. Mr. Tyler alleged two years after divorce from his wife that he was not

the natural father of Mrs. Tyler's son and he should therefore no longer be required to pay child support.

It is clear that the mother may use the rule in *Tyler* to enforce her husband's duty to support her child though he be not the child's father, but the issue in this case is whether the natural father may use the rule in *Tyler* to avoid support of his child. Whether or not the rule in *Tyler* is applicable to all such circumstances, we find it applicable here at least in part due to the length of the marriage and age of the child at the time of divorce. It is alleged in the record that Rooker's marriage ended in divorce in July of 1979, when the son was over seven years old.

For the foregoing reasons, the result reached in the trial court is affirmed. Costs are taxed to the appellant.

/s/ Highers

Highers, J.

/s/ Crawford

Crawford, Jr.

/s/ Farmer

Farmer, J.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LEE ROOKER, *Appellant*,

v.

ROBERT W. RIMER, *Appellee*.

SHELBY LAW

ORDER

Upon consideration of the application for permission to appeal filed by the appellant, the reply of the appellee, the briefs of counsel and the entire record, it is the decision of the Court that the application should be and the same is hereby denied.

Costs will be borne by the appellant.

PER CURIAM

AFFIDAVIT OF SERVICE

The undersigned not being a member of the Bar of this Court states that on November 6, 1989, three copies of the Petition for Writ of Certiorari were served upon opposing counsel as follows:

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by United States Mail first class postage pre-paid pursuant to Rules 28.3 and 28.4 (c), respectively.

/s/ James F. Schaeffer, Jr.

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